Expressive Freedom and Tobacco Advertising: A Canadian Perspective

In 1989, Canada enacted the Tobacco Products Control Act (TPCA), which prohibited tobacco advertising, required health warnings on tobacco packaging, and restricted promotional activities. Canada's tobacco companies challenged the TPCA's constitutionality, arguing that it infringed on freedom of expression. Although it seemed likely that the Canadian Supreme Court would uphold the legislation, in 1995 the court declared the impugned provisions to be unconstitutional. The decision is testimony to the constraining force of liberalism on tobacco regulation, but it is also evidence of the power of political will. While the Canadian government could have used the decision to justify withdrawing from further confrontations with powerful commercial interests, it chose instead to enact new tobacco control legislation in 1997.

Christopher P. Manfredi, PhD

ON SEPTEMBER 21, 1995, the Supreme Court of Canada delivered its judgment in *RJR-MacDonald Inc v A-G Canada*.[1] As in *Lorillard Tobacco Co v Reilly*,[2] the issue in this case was the constitutionality of legislative restrictions on tobacco advertising. The statute under review was part of a comprehensive, internationally recognized anti-tobacco strategy combining taxation, legislation, and educational programs.[3(p189,194)] As in the United States, a closely divided Canadian Supreme Court declared that the impugned restrictions constituted an unreasonable limit on freedom of expression. The similarities between the 2 judgments suggest that there is a common liberal principle that governs the relationship between civil liberties, commercial expression, and public health.

POLICY AND LEGAL BACKGROUND

Passed in 1989, the federal Tobacco Products Control Act (TPCA) prohibited *all* forms of tobacco advertising in Canada, required health warnings on tobacco product packaging, and restricted promotional activities. Not surprisingly, Canada's major tobacco companies immediately challenged the TPCA's constitutionality, arguing that it exceeded the federal government's legislative authority and violated the constitutional protection of freedom of expression. The tobacco companies won on both points at trial, but the Quebec Court of Appeal reversed this decision, a judgment that led to the proceedings in the Canadian Supreme Court.

In deciding *RJR-MacDonald*, the court had to negotiate 2 separate lines of precedent. One line involved the constitutional guarantee of freedom of expression as set out in section 2(b) of the Canadian Charter of Rights and Freedoms. The court had defined the purpose of this guarantee very broadly to include the general search for truth, political participation, and self-fulfillment. Consequently, the court determined that the term "expression" covered *any* attempt to convey meaning, including meaning of a commercial nature, short of actual violence.[4(p60-68)] The second line of precedent involved section 1 of the charter, which stipulates that rights and freedoms are subject to "reasonable limitations." Limits are reasonable if they are proportionately related "to concerns that are pressing and substantial in a free and democratic society." To be proportionate, a limit must be rationally connected to the legislative objective, be the least restrictive means of achieving the objective, and provide benefits that outweigh the costs of the impairment.[4(p38–42)]

As oral argument began in *RJR-MacDonald* on November 19, 1994, the federal government's position appeared strong. Two provincial governments and 5 nongovernmental organizations intervened in the case to support the TPCA's constitutionality, while not a single group intervened to support the tobacco industry's position. In previous cases, the Supreme Court had upheld at least 3 equally intrusive restrictions on expressive freedom, including restrictions on advertising aimed at children,[5] criminal prohibitions against propagating hatred,[6] and criminal prohibitions against obscenity.[7] Given the important public health context of the legislation, the alignment of governmental support for the legislation, and the absence of any nonindustry advocate for the tobacco companies' position, there seemed to be no reason why the TPCA's restrictions on tobacco advertising would experience a different fate. Yet experience a different fate they did.

THE JUDGMENT AGAINST RESTRICTIONS

Although the court upheld the TPCA as a legitimate exercise of

federal legislative power and accepted the public health objectives underlying the statute as "pressing and substantial," it agreed with the tobacco industry's freedom of expression challenge. Consistent with the broad definition given to freedom of expression in earlier cases, the court unanimously held that the TPCA limited this freedom contrary to the constitutional guarantees of the charter. However, contrary to the position it had taken with respect to children's advertising, hate propaganda, and pornography, a 5-to-4 majority of the court did not find this limit reasonable or demonstrably justified under section 1 of the charter. The majority itself divided over the precise reasons for this conclusion. Two justices held that, although there was a rational connection between all 3 categories of regulation (concerning advertising, promotion, and labeling) and the statute's objectives, the regulations nevertheless failed the minimal-impairment test. Three justices issued an even harsher judgment, since they refused to find a rational connection between the promotional restrictions and tobacco consumption.

With respect to advertising and labeling, the majority judgment identified 2 crucial flaws in the impugned legislation. The first was a failure to distinguish between "brand preference" and "lifestyle" advertising, and the second was a failure to allow tobacco companies to attribute health warnings to government authorities (which the court said forced the companies to express opinions that they did not necessarily hold). In both cases, the majority was very critical of the government's failure to introduce evidence that less intrusive regulations would fail to achieve the government's public health objectives. On this point, the government made a critical tactical error by choosing "to withhold from the factual record evidence related to the options it had considered as alternatives to the total ban it chose to put in place." This action clearly alienated the court, which admonished the government that, in cases "of wide public interest constitutional litigation," it "should remain non-adversarial and make full disclosure."[1(par186)]

The 4 dissenting justices, by contrast, accepted the legislation as a reasonable limit on an expressive activity they found to be far "from the 'core' of freedom of expression values."[1(par75)] The minority argued that the sole purpose of tobacco advertising "is to promote the use of a product that is harmful and often fatal to the consumer by sophisticated advertising campaigns often specifically aimed at the young and most vulnerable."[1(par118)] In its view, this was precisely the type of "social legislation" that merited a high degree of judicial deference to legislative choice. The dissenting justices noted that the complete ban on advertising followed 2 decades of experimenting with less intrusive measures, and that the unattributed health warning requirement represented only a "minuscule" burden on the tobacco companies' expressive freedom. The majority rejected this approach, arguing that "to carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."[1(par136)]

The similarity in analytical approach and outcome in *RJR-MacDonald* and *Lorillard* suggests that the American result was not necessarily the idiosyncratic product of a particular alignment of political preferences on the US Supreme Court. Given the public health hazards posed by tobacco use, it is perhaps easy to forget the high value placed on expressive freedom in liberal democracies. As the Canadian approach to issues like advertising to children, hate propaganda, and pornography indicates, this value is neither absolute nor infinite. However, careful reasoning and evidence are required to justify limiting it. In this instance, the Canadian Court, like its US counterpart 6 years later, was not persuaded by the government's demonstration of the necessity of the impugned measures.

One lesson that might be derived from the Canadian case, therefore, is that liberalism implies inherent limits on the policy instruments that governments can employ to control tobacco. But there is a second lesson, which is that governments need not let courts have the final word in this regard. This lesson is evident in the Canadian government's reaction to *RJR-MacDonald*.

LEGISLATIVE REACTION

In 1997, the Canadian government replaced the TPCA with the Tobacco Act.[8] The Tobacco Act and its associated regulations impose general restrictions on manufacturers and distributors; restrict promotion, packaging, and

products; and impose point-of-sale restrictions. Although the Tobacco Act replicates the basic regulatory framework of the TPCA, the government reconstructed parts of that framework to address the constitutional deficiencies identified in *RJR-MacDonald*. In particular, unlike the TPCA, the Tobacco Act distinguishes between "brand preference" and "lifestyle" advertising; it imposes an absolute prohibition on the latter while simply regulating the former. In addition, the Tobacco Act permits tobacco companies to attribute health warnings to Health Canada. In these respects, the 1997 statute concedes the court's constitutional point to the partial benefit of the tobacco industry.

In order to compensate for this partial regulatory relaxation, the labeling requirements promulgated under the Tobacco Act on June 28, 2000, surpass those that existed under the TPCA, and they are probably the most stringent currently in existence anywhere. As expected, less than 2 weeks after these regulations became law, Canada's largest tobacco company initiated proceedings to have the revised labeling and reporting requirements nullified as unconstitutional violations of freedom of expression. The company also asked the Quebec Superior Court to stay the implementation of the regulations until its constitutional challenge could be heard, but on September 20, 2000, the court rejected the stay application and held that tobacco companies must comply with the regulations until their constitutional validity is determined. On January 1, 2001, the new labels began to appear on cigarette packages.

What is the likelihood that the Tobacco Act and its regulations can withstand constitutional scrutiny? There are at least 2 reasons for the current federal government to be optimistic. First, it will be defending a law of its own design before a Supreme Court with at least 4 new justices of its own appointment. Given the narrow margin of the 1995 judgment (5–4) the combination of an amended statute and judicial personnel changes could shift the outcome of the court's section 1 analysis. Second, the current government has a better idea of the evidentiary burden it faces than it did when it was defending a statute enacted by its predecessor. Moreover, it is unlikely to alienate the court by withholding relevant evidence.

CONCLUSION

As Kagan and Vogel note, the powerful combination of material interests and ideas about the appropriate scope of government activity in liberal states makes the establishment of *any* tobacco regulation remarkable.[9(p24)] The Canadian and American Supreme Court decisions in *RJR-MacDonald* and *Lorillard* are certainly testimony to the constraining force of ideas. Indeed, the Canadian decision, emerging from a context that does not include the quasi-religious American devotion to free speech, is perhaps even stronger evidence of this constraint. However, the Canadian case is also evidence of the power of political will. While the Canadian government could have used *RJR-MacDonald* to justify withdrawing from further confrontations with a powerful set of material interests, it chose not to. Whether it has now found an acceptable balance between freedom of expression and the pursuit of public health remains to be determined. ■

About the Author

The author is with the Department of Political Science, McGill University, Montreal, Quebec.

Requests for reprints should be sent to Christopher P. Manfredi, PhD, Department of Political Science, McGill University, 855 Sherbrooke St W, Montreal, QC, Canada H3A 2T7 (christopher.manfredi@mcgill.ca.

This commentary was accepted October 31, 2001.

Acknowledgments

The author acknowledges the financial support of the Robert Wood Johnson Foundation Project on Tobacco Control and the Liberal State, as well as the financial support of the Social Sciences and Humanities Research Council of Canada.

References

1. [1995] 3 SCR 199.
2. 121 SCt 2404 (2001).
3. Cunningham R. *Smoke and Mirrors: The Canadian Tobacco War*. Ottawa, Ontario: International Development Research Center; 1996.
4. Manfredi CP. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. 2nd ed. Toronto, Ontario: Oxford University Press; 2001.
5. *A-G Quebec v Irwin Toy Ltd*, [1989] 1 SCR 927.
6. *R v Keegstra*, [1990] 3 SCR 697.
7. *R v Butler*, [1992] 1 SCR 452.
8. SC 1997, c 13.
9. Kagan RA, Vogel D. The politics of smoking regulation: Canada, France, the United States. In: Rabin RL, Sugarman SD, eds. *Smoking Policy: Law, Politics, and Culture*. New York, NY: Oxford University Press; 1993:22–41.